OOI BEE TAT

v.

OOI BEE TAT DEVELOPMENT SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
EDGAR JOSEPH JR J
[ORIGINATING MOTION NO. 44 OF 1983]
7 MAY 1984

CIVIL PROCEDURE: *Originating notice of motion - Declaration as to ownership of disputed properties - Rights of bona fide purchaser for value without notice - Fraud - Disputed questions of fact - Whether correct procedure.*

In this case the respondents raised a preliminary objection that in view of disputed questions of fact, including questions of fraud, the procedure by way of originating notice of motion was not appropriate and the correct course was by writ of action. By an originating notice of motion the applicant sought, *inter alia*, a declaration that certain disputed properties bought by him and transferred into the name of the first respondent company was held in trust for him by the latter. The first respondent company contended that the disputed properties were transferred to it for valuable consideration by the allotment of shares in return to the applicant. The applicant also maintained that his alleged removal as a director of the first respondent company was done without his knowledge and in his absence implying 'fraud or dishonesty of some sort'. The respondents claimed to be *bona fide* purchasers of value without notice of the disputed properties from the first respondent.

Held:

[1] Upholding the preliminary objection that as the primary relief sought was a declaration of ownership of the disputed properties and as questions of fraud and the rights of *bona fide* purchasers of value without notice of any trust was involved, this was eminently a matter where the disputes should be resolved by way of witness action in open Court, i.e. by way of writ.

[2] Applicant at liberty to proceed by way of a witness action, that is, by writ.

[Originating motion dismissed with costs.]

Cases referred to:
Foon Seong v. Chan San Choon [1947] MLJ 85
In re Powers [1885] 30 Ch. D. 291
E'Singam v. Dr. Sundram & Ors. [1960] MLJ 91
Ong Yok Chu & Anor. v. Yong Teck Fong & Anor. [1960] MLJ 292

For the applicant - Ranjit Raj Sharma; M/s. Sharma & Jaffar
For the 1st respondent - N.G. Sivanandan; M/s. Presgrave & Matthews
For the 2nd, 3rd & 4th respondents - Balwant Singh; M/s. Balwant Singh & Co.
For the 5th respondent - Ang San Hai; M/s. Lim Huck Aik & Co.

JUDGMENT

Edgar Joseph Jr J:

This is a tale of members of a family who have fallen out. They belong to two opposing camps; the husband in one and the wife and three sons in the other. Their quarrel is about ownership of certain land on which stand six dwelling houses, namely, Nos. 17/27, Katz Street,

Penang (the disputed properties), and each camp is accusing the other of lying. Charges of fraud are also in the air. Their quarrel has now reached this Court in the shape of an application by originating notice of motion by the father supported by affidavit praying for various orders to which I shall presently refer.

His story in a nutshell is that early in 1977 he purchased the disputed properties for RM150,000 but caused the transfer to be registered in the name of Ooi Bee Tat Development Sdn. Berhad (the First respondent) a family company of which one of his sons and he were the original subscribers. Later that year, the First respondent company allotted 70,000 shares to his wife and 40,000 to each of his two sons, amounting in all to 150,000 shares.

He then claims that he lost control of the First respondent company and that although the relevant return in Form 49 showed that he had 'retired' as a director on 14 May 1991, this was not in fact so inasmuch as "this 'retirement' was done in my absence and without my consent." That fraud or dishonesty of some sort was implied in this allegation is clear beyond preadventure.

He then makes the further claim that subsequently, in breach of trust, the First respondent company entered into a number of sale and purchase agreement whereby it sold the disputed properties to the second, third, fourth and fifth respondents, each of whom have lodged private caveats to protect their respective interests thereunder.

He then consulted his solicitors to recover the disputed properties and, as a preliminary step, sought removal of the caveats but to no avail. Hence, these proceedings.

He prays for a declaration that the First respondent company holds the disputed properties in trust for him, for vesting orders in his favour and for expungement from the records of the Commissioner of Land Titles, Penang, of all entries relating to the caveats aforesaid.

The case for the opposing camp is set out in the affidavit of Ooi Kim Keat, managing director of the First respondent company, affirmed to on 13 January 1984 (Encl. 16).

He asserts that within less than three months after its incorporation, the directors of the First respondent company (including the applicant) resolved that the First respondent company would purchase the disputed properties for RM150,000. In support, he exhibited the relevant minutes of the director's meeting, being Exh: OKK 1.

Next, he asserts that pursuant to that resolution on 9 August 1977 the disputed properties were transferred to the First respondent company for a consideration of RM150,000, paid no doubt by the applicant but, in advancement of the shares issued by the First respondent company to the applicant's wife (Ong Heok) and his two sons, Ooi Kim Seong and Ooi Kim Hoo, to which I have already adverted. In support, he exhibited the relevant Circular Directors' Resolution dated 10 September 1977 (Exh: OKK 3) and a copy of an extract from the Journal of the First respondent company certified by its auditors, showing that the applicant had paid the RM150,000 to the First respondent company in respect of the abovementioned allotment of shares.

He accordingly asserts that the applicant paid the sum of RM150,000 by way of a gift having regard to the relationship of the parties concerned and that "the element of trust does not arise."

Affidavits have also been affirmed to by the other four respondents, the purchasers of the disputed properties and, each of them asserts that he was a *bona fide* purchaser for value without notice of any trust which the applicant claims attaches to the disputed properties.

So much for the background to this application which, when it came before me, was met with the preliminary objection of Counsel for the First respondent company, supported by Counsel for the other respondents, that as there were disputed questions of fact and including, I might add, questions of fraud, procedure by way of originating notice of motion was not appropriate and that the correct course would be to proceed by writ.

Counsel for the applicant, on the other hand, submitted that the onus was on the First respondent to displace the inference of a trust since it was admitted that it was the applicant who had paid the purchase price. He conceded that the applicant had intended a gift to his wife and two sons but the subject-matter remained uncertain. Was it a gift of money or shares or an assignment of a debt or the disputed properties? If this were so, then the applicant was certainly changing his tune bearing in mind the contents of the affidavit filed in support of the originating notice of motion. Be that as it may, it was submitted, rather optimistically I thought, that the answer to these questions could be supplied by the documents in the case and there was no need to have recourse to oral evidence.

In my opinion, as the primary relief sought in this case was a declaration as to ownership of the disputed properties specifically, whether they were subject to a trust in favour of the applicant and as questions of fraud and the rights of a *bona fide* purchaser for value without notice of any trust are involved, this was eminently a matter where the disputes should be resolved by way of a witness action in Open Court, that is to say, by a way of a writ. There is a wealth of authorities for this proposition but I need only refer to *Foon Seong v. Chan San Choon* [1947] MLJ 85 (per Bostock Hill J.); *In re Powers* [1885] 30 Ch.D 291, 296; *E'Singam v. Dr. Sundram & Ors.* [1960] MLJ 91 (per Adams J); *Ong Yok Chu & Anor. v. Yong Teck Fong & Anor.* [1960] MLJ 292 (per Ismail Khan J).

The originating notice of motion was accordingly dismissed with costs but with liberty to the Applicant to proceed by way of a witness action, that is to say, by writ.

Also found at [1984] 2 CLJ 119